UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

FRED MEYER STORES, INC.

and **Cases-19-CA-32908**
19-CA-33052

ALLIED EMPLOYERS

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

***Ann-Marie Skov, Esq.,* Seattle, WA, for the Acting General Counsel.**
***Carson Glickman-Flora, Esq.,* Seattle, WA, for the Union.**
***Richard J. Alli, Jr., Esq.,* and *Jennifer A. Sabovik, Esq.,* Portland, OR, for the Respondents.**

DECISION

Statement of the Case

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Seattle, Washington on July 24, 25, and 26, 2012. This case was tried following the issuance of an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the complaint) by the Acting Regional Director for Region 19 of the National Labor Relations Board (the Board) on February 29, 2012. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by United Food and Commercial Workers Local 367, Affiliated with United Food and Commercial Workers International Union (the Union or the Charging Party). It alleges that Fred Meyer Stores, Inc. (Respondent Fred Meyer) and Allied Employers (Respondent Allied), collectively called the Respondents, have violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Further, it alleges that the Respondent Fred Meyer separately violated Section 8(a)(1) of the Act. The Respondents filed timely answers to the complaint denying the commission of the alleged unfair labor practices.[1]

[1] All pleadings reflect the complaint and answers as those documents were finally amended at the hearing. The Respondent Fred Meyer and the Respondent Allied each filed a separate

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All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the Acting General Counsel, counsel for the Respondents, and counsel for the Union, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the Respondent Fred Meyer's answer admits, and I find that at all times material herein, the Respondent Fred Meyer has been an Ohio corporation, with offices and places of business, *inter alia,* in Tacoma, Lacey, and Tumwater, Washington, where it has been engaged in the retail grocery business. Further, I find that during the twelve month period preceding the issuance of the complaint, the Respondent Fred Meyer in conducting its business operations as just described, derived gross revenues in excess of $500,000; and during the same period of time purchased and received at its facilities located in the State of Washington goods valued in excess of $50,000 directly from points located outside the State of Washington.

Accordingly, I conclude that the Respondent Fred Meyer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the Respondents' two answers admit, and I find that at all times material herein, the Respondent Allied has been a non-profit multi-employer association owned by its various employer members, including the Respondent Fred Meyer, who are engaged in the retail grocery business, among other businesses, and represents its employer-members in negotiating and administering collective bargaining agreements with various labor organizations, including the Union. Further, it is stipulated by all parties, and I find, that at all relevant times, the Respondent Fred Meyer, among other employer members, has delegated to the Respondent Allied its representation in negotiating and administering collective-bargaining agreements with the Union. (Jt. Ex. 18.)

Finally, all the parties stipulated and I find that for all relevant times, the Respondent Allied and its employer members, including the Respondent Fred Meyer, have each and

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answer to the complaint. The General Counsel's formal documents (G.C. Ex. 1) contain the charges, amended charges, and affidavits of service establishing the dates upon which those charges were filed with the Board and served on the Respondents, as alleged in the complaint. Those formal documents include a Motion to Correct General Counsel Exhibit 1, filed by the Acting General Counsel on September 24, 2012, and not opposed by the Respondents. That Motion is hereby admitted into evidence as G.C. Ex. I(t).

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

collectively been at all material times employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Ex. 18.)

II. Labor Organization

The complaint alleges, the Respondents' two answers admit, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Self-Determination Elections

All parties stipulated and I find that on or about April 24, 2009, in Case 19-RC-15036, a majority of all regular full-time and part-time employees, clerks, and assistant managers working in the Nutrition Department of the Respondent Fred Meyer's Lacey and Tumwater, Washington, retail stores (the "nutrition voting group"), in a self-determination election, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent Fred Meyer, to be included in the then existing Grocery Unit (the "Expanded Grocery Unit."). (Jt. Ex. 18.)

Further, all parties stipulated and I find that on or about June 17, 2009, in Case 19-RC-15194, a majority of all regular full-time and part-time employees working in the Playland Department of the Respondent Fred Meyer's University Place retail store, located in Tacoma, Washington (the "playland voting group"), in a self-determination election, designated and selected the Union as their representative for the purpose of collective bargaining with the Respondent Fred Meyer, to be included in the then existing Central Checkstand (CCK) Unit (the "Expanded CCK Unit.") (Jt. Ex. 18.)

The evidence establishes and the Board has concluded that the following employees of the Respondent Fred Meyer in the Expanded Grocery Unit constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees employed in [the Respondent Fred Meyer's] present and future grocery stores in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the Nutrition Department of [the Respondent Fred Meyer's] Lacey and Tumwater, Washington, retail stores; excluding Nutrition Department Managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Act.

On August 26, 2010, the Board found that based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Expanded Grocery Unit. *Fred Meyer Stores, Inc.,* 355 NLRB No. 141, slip op. 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.,* 354 NLRB No. 127 (2010) (Jt. Ex. 5, 7.).

Additionally, the evidence establishes and the Board has concluded that the following employees of the Respondent Fred Meyer in the Expanded CCK Unit constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees employed in [the Respondent Fred Meyer's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County…and all regular full-time and part-time employees working in the Playland Department of [the Respondent Fred Meyer's] University Place retail store, located in Tacoma, Washington; excluding guards, the Department Manager, two Assistant Department Managers, and supervisors as defined in the Act.

On August 26, 2010, the Board found that based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Expanded CCK Unit. *Fred Meyer Stores, Inc.,* 355 NLRB No. 130, slip op. 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.,* 355 NLRB No. 30 (2010) (Jt. Ex. 6, 8.).

IV. Alleged Unfair Labor Practices

A. The Undisputed History

Certain facts concerning the bargaining history of the parties are undisputed. Fred Meyer owns and operates 131 retail stores in several states including Washington State. Of those stores, 123 are considered to be "one stop" shopping stores selling a full line of merchandise, including grocery and general merchandise items, such as apparel, home, photo, electronics, and garden goods. These are very large stores, all over 100,000 square feet in size. The remaining eight stores are called "marketplace" stores. They are less than 100,000 square feet in size and sell primarily grocery items, and do not sell home and apparel goods.

The Union (Local 367) represents approximately 1,000 employees at the Fred Meyer's stores within the Union's jurisdiction which covers six Washington counties, Pierce, Mason, Thurston, Pacific, Grays Harbor, and Lewis. In western Washington State (a.k.a. the "Puget Sound" area) the Respondent Fred Meyer's employees are represented not only by Local 367, but also by United Food and Commercial Workers (UFCW) Locals 21 and 81, and in some instances by Teamsters Local 38. The Respondent Allied represents the Respondent Fred Meyer and other grocer employers such as Safeway and Albertsons in multi-employer bargaining with the Union and with its sister UFCW locals that have jurisdiction over adjacent geographical areas.

Historically, the grocery, meat, and CCK agreements expire on different dates every three years, with the earliest expiration dates falling in May. The practice has been that the multi-employer, multi-union negotiations for successor agreements would be held by the parties in Seattle, King County, Washington. These negotiations are commonly referred to as the "Seattle Negotiations," and the settlement agreements resulting from those negotiations are commonly referred to as the "Seattle Settlement."

On April 24, 2009, a majority of the Nutrition Department employees[3] at the Fred Meyer one-stop stores in Lacey and Tumwater (both Thurston County) voted in a self-determination election to be represented by the Union as part of the existing Mason/Thurston two-county grocery unit. (Jt. Ex. 18.) The Certification of Representative issued on May 7, 2009. (Jt. Ex. 2.) On June 17, 2009, a majority of the Playland Department employees[4] at the Fred Meyer's one-stop store in University Place (Pierce County) voted in a self-determination election to be represented by the Union as part of the existing county-wide CCK unit. (Jt. Ex. 18.) The Certification of Representative issued on December 8, 2009. (Jt. Ex. 4.)

As of June 26, 2009, the Respondent Fred Meyer refused to bargain with respect to the Lacey and Tumwater nutrition employees to test the validity of the certification. (Jt. Ex. 5, 7, Jt.

[3] The Nutrition Department is found within the food department and contains dietary supplements, organic food products, other grocery items, and non-food items.

[4] Playland areas are supervised play areas for shoppers' children. Playland employees are responsible for supervising the shoppers' children among other tasks.

Ex. 17 [U. 4 & U. 7.])[5] As of November 5, 2009, the Respondent Fred Meyer refused to bargain with respect to the University Place playland employees, again to test the validity of the certification. (Jt. Ex. 6, 8, Jt. Ex. 17 [U. 5 & U. 6.])

On August 26, 2010, the Board found that the refusals to bargain violated Section 8(a)(5) of the Act.[6] Further, on January 9, 2012 the Ninth Circuit Court of Appeals in an unpublished decision granted the Board's applications for enforcement of its orders requiring the Respondent Fred Meyer to recognize and bargain with the Union about the terms and conditions of employment for the nutrition and playland employees. (Jt. Ex. 9.)

In order to understand the issues that developed between the Respondents and the Union during and after the 2010 negotiations, it is necessary to have a historical perspective by first viewing earlier negotiations. From the testimony at the hearing, it appears uncontested that prior to 2007, the Union (Local 367) was an active participant in the Seattle Negotiations. However, during the 2004 negotiations matters changed for the Union.

Teresa Iverson testified at length at the hearing. Although currently retired, she was a thirty seven year member of the Union and a former member of its executive board and its President. She led the Union's bargaining team during the 2004 Seattle Negotiations. Also testifying at length at the hearing was Randy Zeiler, the President of the Respondent Allied Employers, who has been the chief spokesperson for the grocery employers since 2001. According to Zeiler's testimony at an arbitration hearing, Iverson and her bargaining team walked out of the 2004 negotiations before they were completed. (Jt. Ex. 16, p. 45.)[7] The grocery employers and the remaining UFCW Locals then agreed on a settlement for the grocery, meat, and CCK agreements effective from 2004-2007. Wanting to protect Local 367's members after Local 367 walked out of the negotiations, the UFCW International Representative present during the Seattle Negotiations informed Randy Zeiler of Allied Employers that the grocery employers would have to offer the same settlement to Local 367 as a condition of settlement with the remaining UFCW Locals. (Jt. Ex. 16, p. 45-46.)

According to Zeiler, he complied by offering the same settlement to Local 367 through the federal mediator who had been assigned the 2004 Seattle Negotiations. Zeiler indicated that he essentially took the 2004 Seattle Settlement, changed the names from Local 21 and 81 to Local 367, and presented it to Local 367. Zeiler testified that if Local 367 did not accept the settlement as presented by him, then Local 367 would have had to bargain its agreements separately with the Respondent Allied Employers. Although Local 367 initially rejected the proposal, it ultimately accepted Zeiler's offer, and once its members ratified the 2004 Seattle Settlement, it applied the same settlement to all of its agreements. (Jt. Ex. 16, p. 46-47, Jt. Ex. 17, [E. 4, 5, 6, 8.])

Regarding the 2007 Seattle Negotiations, Zeiler testified both at this hearing and at an earlier arbitration hearing that the relationship between the Union and the other UFCW Locals was not good and that as a result, Local 367 was not invited to participate in the joint

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[5] References to Joint Exhibit 17 (Jt. Ex. 17) are to an arbitrator's decision and exhibits attached to it. That arbitrator's decision will be more fully explained later in this decision.

[6] *Fred Meyer Stores, Inc.,* 355 NLRB No 141, slip op. 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.,* 354 NLRB No. 127 (2010) (Jt. Ex. 5, 7.); *Fred Meyer Stores, Inc.,* 355 NLRB No. 130, slip op 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.,* 355 NLRB No. 30 (May 7, 2010) (Jt. Ex. 6, 8.)

[7] The transcript from the arbitrator's decision containing the testimony of Zeiler.

negotiations. (Jt. Ex. 16, p. 48.) This contention was not denied by the Union. Further, Zeiler testified, and a letter from Teresa Iverson, as President of the Union, to the membership of Local 367, dated May 31, 2007, confirms that Iverson had proposed to Zeiler that the parties execute an "interim/me-too agreement." Iverson was concerned that if the Union were forced to engage in individual bargaining with the Respondent Allied Employers that it would not by itself be able to achieve successor grocery, meat, and CCK agreements that would improve upon any settlement reached in the Seattle Negotiations. (Jt. Ex. 16, p. 48; Res. Ex. 1.)

The statements made by Iverson in the May 31, 2007 letter are very telling, and help to explain the Union's actions three years later. In this letter, Iverson explains to the members of Local 367 that the Union had originally proposed to Zeiler "a two-step process, meaning that the members would have voted first on whether to enter into an interim/me-two agreement, and then later vote on whether to accept the proposal that emerges from the Seattle Negotiations." However, she explains that, "because the employers were not willing to allow 'two bites of the apple,' the proposal agreed to by your employer has changed to a **one-time vote** on whether to enter into an interim/me-too agreement that will bind us to the terms of the Seattle agreement, whatever it will be, for better or for worse." (Emphasis as in original) Iverson goes on to say that the Me-Too Agreement would extend to the Union the same terms and conditions as are approved and ratified by the Seattle Locals. Further, that "[t]his agreement is not intended to change or modify that past application or interpretation of our agreement where their [sic][8] language differs from Seattle's." In closing, Iverson and the Union Executive Board recommended that the members vote to approve the Me-Too Agreement in this one-time vote process. (Res. Ex. 1.)

Enclosed with the May 31, 2007 letter were "Voting Instructions." In part those instructions read: "You are voting on whether you accept the me-too proposal described in this mailing. This means **all** changes approved and ratified by the members in Seattle will be the same for Local 367 Grocery, Meat, and CCK contracts." (In the original, the entire sentence is in bold type.) (Res. Ex. 1, p. 4.)

The result of the vote was announced to the members in a letter from Iverson dated June 2007. She indicated that "the members overwhelmingly accepted the offer of an interim me-too agreement…" Further, she explained that "whatever settlement emerges from the Seattle negotiations, if it is accepted and ratified by the members in Seattle, will be applied to Local 367's contracts with Allied-represented employers throughout our jurisdiction." Apparently Iverson felt the need to continue to justify the Me-Too Agreement approach to the membership because she went on to say that without that agreement, "[t]he major concern was that the employer group would bargain an agreement with Locals 21 and 81 in Seattle, and then present a worse proposal to members of Local 367." In closing, she assured her members that now they know that "they will not have a lesser settlement than the members in Seattle." (Res. Ex. 1, p. 5.)

As the expiration of the 2007 contract approached, the Union apparently asked Locals 21 and 81 to allow Local 367 to bargain alongside them in the upcoming Seattle Negotiations. In a letter dated April 2010 sent to the Union's members, Iverson indicated that such a proposal had been made by the Union, but was rejected by Locals 21 and 81. (Res. Ex. 3.) Once again, the Union, by Iverson, explained to its members its concern "that the employers will try to reach an agreement in Seattle and then present a much worse proposal to member of Local 367." For that reason, the Union had proposed to Respondent Allied Employers an "interim/me-to

[8] Instead of "their," I believe Iverson meant "our."

agreement." According to Iverson's letter, "Allied Employers signed an interim/me-too agreement that will bind us to the terms of the Seattle agreement whatever it will be. This document is identical to the agreement Local 367 members voted to accept in 2007. If accepted by Local 367 members, the interim/me-too agreement will extend the same terms and conditions to us as are approved and ratified by members of Local 21 and 81, while maintaining the effective dates of our contracts and **any terms that are unique or different in our agreements**….**This agreement is not intended to change or modify the past application or interpretation of our agreements where their language differs from Seattle.**" (Emphasis added by the undersigned.) (Res. Ex. 3.)

Further, in closing the letter stated: "In summary, you are voting on whether you accept the interim/me-too proposal described in this letter. This means **all** changes approved and ratified by the members in Seattle (Locals 21 and 81) will be the same for Local 367, Grocery, Meat, and Fred Meyer CCK contracts on their effective dates." (Emphasis added by the undersigned.) As Iverson indicated that she "did not believe that we can exceed the agreement that will be bargained in Seattle," and, thus, recommended approval of the proposal. (Res. Ex. 3.) The Union's members ratified the 2010 Me-Too Agreement on April 27, 2010.[9] (Res. Ex. 4.)

During the 2010 negotiations in Seattle, the Respondent Allied Employers and UFCW Local 21 agreed to specifically exclude the nutrition and playland employees from coverage under the grocery and CCK agreements, respectively. They agreed to a "Letter of Understanding #12," which modified the grocery agreement, as it applied to Respondent Fred Meyer, by adding exclusions to the agreement's recognition clause. Among those exclusions were employees in the Nutrition and Playland Departments. (G.C. Ex. 7, p. 13.) They also agreed to modify the language in the recognition clause in the CCK agreement with Fred Meyer by excluding, among other employees, those employees in the Nutrition and Playland Departments. (G.C. Ex. 7, p. 20.) The members of Locals 21 and 81 ratified the new Seattle Settlements, which contained the modified recognition and bargaining unit clauses, on about December 3, 2010. Further, it is important to mention that the settlements provided for a lump sum ratification bonus that amounted to about $500 for full-time employees.

It is undisputed that the interim Me-Too Agreement entered into between the Respondents and the Union regarding the 2010 Seattle Settlement Agreement provided that either party may request expedited arbitration to resolve any disputes that arise under its terms or the application of the Local 21/81 settlement to the Union's agreement. (Jt. Ex. 10.) Further, no party contends that prior to the execution of the 2010 Me-Too Agreement there was any discussion between the Respondents and the Union specifically regarding the removal of the nutrition or playland employees from their respective bargaining units. Also, it is uncontested that the Union did not communicate with Locals 21 and 81 while the 2010 negotiations were taking place in Seattle, and that the Union did not attend any of the negotiation sessions. The Union only learned that the negotiations had been successfully completed when so advised by the Respondents.

[9] It should be noted that during Iverson's initial discussions with Zeiler on an interim Me-Too Agreement in 2010, she did ask for one change to the language. She proposed language saying that if an arbitrator had to interpret any part of the Seattle Settlement Agreement, the arbitrator would only consider the bargaining history between Local 367 and the Employers. However, Zeiler rejected the change since there was no actual bargaining between the parties to a Me-Too Agreement (the Union and the Respondent Allied Employers), and, thus, no bargaining history for an arbitrator to consider. Iverson subsequently dropped her request. (Jt. Ex. 16, p. 53-54.)

In early December 2010, the Respondent Allied sent the Union an email expressing an interest in finalizing the Union's contracts so all of the Union represented employees could receive their lump sum bonuses by the end of the month. The Union responded that it had concerns regarding the settlements and stated that the changes to the unit description in the CCK and grocery agreements did not apply to its units. In response, Zeiler sent Iverson an email dated December 8, 2010, in which he said: "The FM exemptions in CCK and Grocery and LU #12 are parts of the UFCW 21 King-Snohomish Grocery and CCK settlements. The March 18, 2010 'Me Too' Agreement states that the Employers agree to extend the **same settlement** to members of Local 367 members [sic]. Therefore, we disagree with your belief that these would somehow not apply to Local 367 members. We need to know your reasoning on this as soon as possible because it is not compatible with the 'me too' you signed in March." (Emphasis as in original.) (G.C. Ex. 7, 8, 9.) Zeiler sent Iverson a follow-up email on December 12, 2010, in which he made it clear that "[t]he ratification lump sum will not be processed or paid until you advise that you are in agreement that all the terms of the UFCW 21 and UFCW 81 settlements apply to Local 367 with no exceptions per the 'me too' agreements." Iverson responded by email the following day, saying the Union did not agree that the "Letter of Understanding" applied to Local 367 and did not agree with the Respondents' "plan to hold up the lump sum." Further, she said, "There is an arbitration provision in the me-too agreement that Allied signed off on. If you disagree with me, let's look at that provision." (G.C. Ex. 9.)

By letter dated December 15, 2010, addressed to Zeiler, Iverson requested that the Respondents implement all terms of the grocery, meat, and CCK settlement agreements forwarded to Local 367 on December 3, 2010, except for five specifically enumerated items with which the Union disagreed. Item number 1 was: "The exclusions from the bargaining unit set forth in the recognition clause of the CCK agreement;" and item number 2 was: "The exclusions from the bargaining unit set forth in Letter of Understanding #12 in the Grocery agreement." Further, Iverson argued that, "[t]he first two provisions are directly contrary to NLRB decisions between Local 367 and Fred Meyer. Local 367 did not authorize, through the 'Me-Too' agreement, the parties to invalidate arbitral and administrative decisions between Local 367 and our members." Additionally, Iverson indicated that the Union was going to request expedited arbitration regarding the disputed items under the Me-Too Agreement. (G.C. Ex. 10.) Thereafter, the parties agreed to submit their dispute to expedited arbitration pursuant to the terms of the 2010 Me-Too Agreement.

On January 5, 2011, the Respondent Fred Meyer posted a notice at its stores addressed to Associates stating that the Union had signed a Me-Too Agreement requiring it to "accept the same settlement" that the Employers had reached with Locals 21/81 without further negotiations. The notice further stated that, "[u]nfortunately, after the settlement was ratified by your coworkers in Locals 21 and 81, your Union refused to accept it as they had agreed. As a result, we cannot pay you a ratification bonus or move forward on any other contract provisions until this matter is resolved." Also, the notice stated that while the Respondent Fred Meyer wanted to pay the ratification bonus quickly, payment might have to wait until the dispute could be resolved through arbitration, a process the length of which was uncertain. (G.C. Ex. 13.)

The parties agreed to submit their dispute to expedited arbitration pursuant to the terms of the 2010 Me-Too Agreement.[10] The arbitration hearing was held on March 2, 2011, to

[10] Technically, the parties to the arbitration were Local Union 367 and Allied Employers, who were the parties to the Me-Too Agreement. However, at the hearing both the Respondents were represented by different representatives, Allied Employers by its President, Randall Zeiler,

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address the issue of whether the Me-Too Agreement required the parties to apply the Local Union 21/81 unit exclusions to the Union represented CCK and grocery units, as well as several other unrelated matters. (Jt. Ex. 16.) On March 24, 2011, the arbitrator issued his decision and award. (Jt. Ex. 13.) Among other conclusions, the arbitrator found that Allied Employers breached the terms of the 2010 Me-Too Agreement by insisting that the Local Union 367 agreements include provisions in the grocery and CCK agreements excluding workers currently represented by Union 367, namely the Lacey/Tumwater nutrition and University Place playland employees. He also found that the Respondent Allied Employers had not breached the Me-Too Agreement by refusing to implement the ratification lump sum bonuses for Local Union 367 members prior to resolution of the dispute before the arbitrator. As a remedy for the violation, he ordered the parties to "retain the status quo with regard to the scope of the bargaining unit." He defined the status quo as being the status reflected in the Board's August 26, 2010 Orders, which were at the time still on appeal to the Ninth Circuit Court of Appeals. Further, the arbitrator ordered the Respondent Allied Employers to "promptly" distribute the lump sum bonus. (Jt. Ex. 13.) It is undisputed that following the arbitrators award, the Respondent Fred Meyer distributed the lump sum bonus to the unit employees represented by the Union, with the exception of the nutrition and playland employees.

B. The Dispute

The principal dispute between the parties is whether the Me-Too Agreement between the Respondent Allied Employers and the Union effectively removed the Nutrition Department employees at the Respondent Fred Meyer's Lacey and Tumwater stores from what has been referred to as the Expanded Grocery Unit, and also effectively removed the Playland Department employees at the Respondent Fred Meyer's University Place store from what has been referred to as the Expanded CCK Unit. The Respondents take the position that the Nutrition Department employees have been so removed such that the Grocery Agreement that went into effect, with effective dates from October 3, 2010 to October 5, 2013 (Jt. Ex. 14.), does not apply to them; and that the Playland Department employees have been so removed such that the CCK Agreement that went into effect, with effective dates from May 10, 2010 to May 4, 2013 (Jt. Ex. 15.), does not apply to them. Concomitantly, the Respondent Fred Meyer has refused to apply the terms and conditions of those respective contracts to the nutrition and playland employees, and has also refused to include them in the payment of lump sum bonuses. Presumably, the Respondents stand ready to bargain with the Union over the initial terms and conditions of employment of the nutrition and playland employees, independent of those terms and conditions negotiated in the Grocery and CCK Agreements.

Of course, the Union and Counsel for the Acting General Counsel take the opposite position, contending that the Me-Too Agreement was never intended by the parties (Respondent Allied Employers and the Union) to authorize the removal of the nutrition and playland employees from their respective Expanded Units, those units to which they were included by virtue of the self-determination elections in 2009. The General Counsel contends that by failing to apply all the terms and conditions of the current Grocery and CCK Agreements, respectively, and to pay the lump sum bonuses, to the nutrition and playland employees, that the Respondents have violated Section 8(a)(1) and (5) of the Act.

Further, it is the General Counsel's position that the Respondents must still negotiate over certain "unique" terms and conditions for the nutrition and playland employees, which

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and Fred Meyer by its Vice-President for Human Resources, Carl Wojciechowski. Both men also testified at the hearing before the undersigned.

"unique terms" are not encompassed by the "general terms" of the current Grocery and CCK Agreements, and that by failing to do so, the Respondents are also violating Section 8(a)(1) and (5) of the Act. However, it is unclear to the undersigned specifically which terms and conditions of employment that the General Counsel considers "unique." In any event, the Respondents' argue that as the "general" terms and conditions of the Seattle Agreements do not apply to the nutrition and playland employees represented by the Union that there are no specific "unique" terms and conditions over which to negotiate.

The secondary dispute between the parties involves the Respondent Fred Meyer's posting of a notice to its associates on January 5, 2011, informing them that the Union was refusing to honor the terms of the Me-Too Agreement, which then allegedly caused the Employer's failure to pay the lump sum bonuses. According to the Acting General Counsel and the Union, this statement was factually incorrect and served to disparage and denigrate the Union in violation of Section 8(a)(1) of the Act. To the contrary, the Respondent Fred Meyer contends its statements in the posted notice were both factually accurate and an expression of free speech specifically protected under Section 8(c) of the Act and by the First Amendment of the United States Constitution. Accordingly, as the posted notice allegedly contained no threat of reprisal, or force, or promise of benefit, the Respondent Fred Meyer argues that it did not constitute a violation of the Act.

C. Analysis and Conclusions

The first issue that must be addressed is to what extent I am required to follow the arbitrator's decision in this case. Counsel for the Union in her post-hearing brief argues that I must defer to that decision. While Counsel for the Acting General Counsel does not specifically say so in her post-hearing brief, her arguments suggest that she agrees with Union counsel that deferral to the arbitrator's decision is appropriate in this case. Counsel for the Respondents argues otherwise, and I am in agreement with that argument.

The Board has historically held that "the determination of questions of representation, accretion and appropriate unit do[es] not depend on contract interpretation but involve[s] application of statutory policy, standards and criteria. These matters are for the decision of the Board rather than an arbitrator." *Marion Power Shovel Co., Inc.,* 230 NLRB 576, 577-78 (1977), citing *Combustion Engineering, Inc.,* 195 NLRB 909 (1972); *Hershey Foods Corp.,* 208 NLRB 452 (1974).

In my view, the unit determination issue is of paramount importance in this case, superseding the contractual issues upon which the arbitrator was ruling. The Board, of course, is capable of analyzing the contractual issues concerning whether the Me-Too Agreement was intended to bind the parties to all the terms of the Seattle Agreement, including the removal of the nutrition and playland employees from the two respective bargaining units. Further, the ultimate issue of unit composition does not lend itself to an arbitrator's decision. Therefore, it is efficient and logical not to defer to the arbitrator's decision in this case, but, rather, to have the undersigned, and ultimately the Board, decide both the contractual issue and the unit composition issue that naturally flows from it. This rationale is further strengthened by the fact that the Board has already addressed the underlying issue of unit determination when it originally ruled on the inclusion of the nutrition employees in the Expanded Grocery Unit and on the inclusion of the playland employees in the Expanded CCK Unit. Accordingly, I conclude that the arbitrator's decision in this matter is not authoritative or binding on the undersigned, and I decline to defer to that decision.

Towards the end of the hearing in this case, after having received all the testimonial and documentary evidence, I asked the parties to consider the question of whether the Respondents and the Union had ever reached a "meeting of the minds" during negotiations regarding specifically what terms and conditions of employment the Me-Too Agreement was to cover. I specifically requested that all counsel address this issue in their respective post-hearing briefs. While counsel for the Acting General Counsel and counsel for the Respondents did so, there is no mention of this issue in counsel for the Union's post-hearing brief.

Counsel for the Acting General Counsel contends that there was a meeting of the minds between the parties and that the purpose of the Me-Too Agreement was to extend the contract settlement reached in the 2010 Seattle Negotiations between the Respondents and Locals 21/81 to all collective bargaining agreements within the Union's jurisdiction with the exception that certain language changes would not be included in Union Local 367's agreements, presumably where the original language was more beneficial to the employees represented by the Union. It is the General Counsel's contention that this language exception encompasses non-economic benefits, and the Me-Too Agreement was only going to apply to economic benefits.

In support of this argument, Counsel for the General Counsel makes reference to language in both the 2007 and 2010 Me-Too Agreements. The 2010 language is as follows: "The parties agree that all changes made in King County Local 21 and 81 settlements that are approved and ratified by members of Local 21 and 81 will be the same as those made in Local 367's agreements, but that the difference in language between the King County Local 21/81 agreement and Local 367's agreements will be preserved. For example, if a 50-cent increase in wages should be agreed to in King County Local 21/81, then the same 50-cent increase would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in King County Local 21/81 settlements, then the same holiday would be dropped in the settlement applied to Local 367's agreements." The 2007 language is substantively the same, with only minor differences. (Jt. Ex. 17, [E. 9, p. 2-4]; Jt. Ex. 10.)

Further, counsel for the General Counsel points out that the question of whether the parties have reached a "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.,* 296 NLRB 776 fn.2 (1989); Also see *Crittenton Hospital,* 343 NLRB 717, 718 (2004). Counsel argues that the above-cited language in the Me-Too Agreements in both 2007 and 2010 establish the parties' objective intent. While I certainly agree with that legal premise, it is not clear just what the parties meant by the above language. Clearly the Me-Too Agreement applied to economic terms, such as wages and fringe benefits like vacations, but did it go so far as to apply to the exclusion of the nutrition and playland employees from the two respective bargaining units? In my opinion, the intent of the parties regarding the central issue before me has simply not been objectively manifested based on the reading of the Me-Too Agreement and/or by the parties bargaining history.

At the time the parties agreed to the 2007 Me-Too Agreement, there was no issue regarding the nutrition and playland employees as they were plainly not part of the various units represented by the Union. On the other hand, while at the time of the 2010 Me-Too Agreement the nutrition employees had been included in the Expanded Grocery Unit and the playland employees had been included in the Expanded CCK Unit, the appropriateness of those inclusions were still being challenged by the Respondent Fred Meyer before the Board. Therefore, I am convinced that at the time the 2010 Me-Too Agreement was executed by the parties, neither the Respondents' representatives nor the Union's representatives were specifically thinking about the nutrition and playland employees when they drafted the language

in the Agreement.

Counsel for the Respondents believe that the parties reached a "meeting of the minds" as to what the 2010 Me-Too Agreement covered, albeit a very different one than that argued by the Union and Counsel for the General Counsel. The Respondents contend that the reference in the Agreement to "difference in language between the King County Locals 21/81 agreements and Local 367's agreements [being] preserved" related only to items similar to those examples set forth in the Agreement, namely wages and fringe benefits. So, for example, if the Seattle Negotiations resulted in a 50-cent increase, the Local 367 represented employees would also get a 50-cent increase, but not the same underlying wage rate, assuming Local 367's members were paid a different underlying rate than those of Locals 21/81. According to the Respondents, these differences in language did not related to matters of unit composition, such as excluding the nutrition and playland employees from their respective units.

The Respondents argue that the Union explicitly gave its bargaining rights to Locals 21/81, in that it specifically agreed to accept whatever contract Locals 21/81 negotiated, with the caveat that "difference in language" would be preserved.[11] That does essentially appear to be correct. But, the questions remains, what did the parties mean by the exception in the Me-Too Agreement for a "difference in language?" Unfortunately, I do not believe that the language is in any way objectively clear and unambiguous.[12] Therefore, it is necessary to attempt to determine the subjective intent of the parties through the use of extrinsic evidence. *See, e.g. R. J. E. Leasing Corp.,* 262 NLRB 373, 379 (1982).

A number of witnesses testified regarding their understanding of the parties' intent during the 2010 negotiations over the Me-Too Agreement. The most important of these witnesses were Teresa Iverson, the Union President during the period in question and the principal union negotiator, Randy Zeiler, the President of Allied Employers and the principal negotiator for the Respondents, and Carl Wojciechowski, the Vice President of Human Resources for the Respondent Fred Meyer. In determining the subjective intent of the parties to the negotiation of the 2010 Me-Too Agreement, it would seem to be important to analyze the credibility of the principal negotiators. As I have discussed, there really exists no tangible piece of documentary

[11] I do not believe that Locals 21/81 by virtue of the Me-Too Agreement became "agents" of the Union, as Locals 21/81 had never consented, so far as the evidence shows, to act on behalf of the Union. Further, the Union's execution of the Me-Too Agreement did not by itself constitute a reasonable basis for the Respondents to conclude that Locals 21/81 was being given such apparent authority by the Union.

[12] The attorney's discuss in their respective briefs what the parties meant in their communication by the term "blank check." However, I do not believe that there is a real dispute here, as it is clear that the reference was to not permitting the members of the Union to have two votes or "two bites of the apple" on whether to be bound by the Seattle Negotiations, as in an initial vote to accept or reject the Me-Too Agreement and, if accepted, having a second vote to accept or reject the Locals 21/81 negotiated contract. It was the Respondents' position, ultimately agreed to by the Union, that the union members would only have one vote, that being on whether or not to accept the Me-Too Agreement, and, if accepted, there would be no second vote. It is also clear to the undersigned that the term "blank check" did not apply to the Union's position regarding the parameters of the Me-Too Agreement, as the Union never explicitly agreed that by virtue of the Me-Too Agreement it was totally bound by those terms and conditions negotiated in Seattle. There still remained the caveat of "difference in language," which the Union was relying on to offer it some protection. However, the phrase "difference in language" apparently meant something very different to the Respondents.

evidence or "smoking gun," as would establish definitively what the parties meant by the "difference in language" reference in the Me-Too Agreement. Therefore, I am left to largely rely on the testimony of the principal witnesses as to their intent during the negotiations.

Perhaps somewhat unusual for a case such as this, I found all the principal witnesses to be thoroughly credible. Iverson, Zeiler, and Wojciechowski all testified in detail, without rancor, were cooperative, and genuinely seemed interested in answering all question accurately, both on direct and cross-examination. Obviously, they were biased in favor of their respective parties. However, I did not get the sense that they were being at all disingenuous or were attempting to exaggerate or embellish the events over which they were testifying.

In particular, Iverson and Zeiler testified in detail about the events leading up to the execution of the 2010 Me-Too Agreement. Neither contends that there was any specific discussion of the unit composition as it related to the nutrition and playland employees, and it is obvious that there was no such discussion because the legal question regarding those employees was still on appeal.

Zeiler's testimony at the hearing was a mirror image of his testimony before the arbitrator. (Jt. Ex. 16.) He insisted that the intent of the Me-Too Agreement was to bind the Union to the same terms and conditions of employment, both economic and non-economic, as that agreed to in the Seattle Negotiations, with the exception of certain language differences. His testimony is supported by that of Wojciechowski who testified that in 2010 he and other representatives of those employers represented by Allied Employers discussed with Zeiler the possibility of the Union signing a Me-Too Agreement. According to Wojciechowski, the "employer group" was "very emphatic about the fact that [the Me-Too Agreement] had to be no restrictions." By no restrictions they meant "whatever settlement we agreed to with Local 21, that settlement would apply to Local 367." Further, he testified that the executed 2010 Me-Too Agreement with the Union had as its only exception to what was agreed to in Seattle, "some language preservations that they had in the contract." In support of the testimony of Zeiler and Wojciechowski, counsel for the Respondent relies in part on a letter dated May 31, 2007 from Teresa Iverson to the Union's membership describing that Me-Too Agreement as "bind[ing] us to the terms of the Seattle Agreement, whatever it will be, for better or for worse." As has been noted above, the 2007 and 2010 Me-Too Agreements were for the most part identical.

For her part, Iverson testified that while the language of the 2007 and 2010 Me-Too Agreements may have been almost identical, the unit composition had changed, since in 2007 the nutrition and playland employees were not yet part of the grocery and CCK units. According to Iverson, the provision in the 2010 Me-Too Agreement permitting the Union's contract to deviate from that negotiated in Seattle where there was a "difference in language" took on extra meaning because, unlike in 2007, by 2010 the unit composition had changed. However, Iverson does not suggest that prior to the execution of the 2010 Me-Too Agreement that there was any discussion regarding the nutrition and playland employees or how the Seattle Negotiations might affect those employees.

Having determined that all the principal witnesses testified credibly, I conclude that the Respondents and the Union simply viewed the 2010 Me-Too Agreement differently. So differently in fact that I am of the view there was no "meeting of the minds" as to what was encompassed by that agreement. As is uncontroverted, there was no specific discussion about the nutrition and playland employees. In the mind of Iverson, the union negotiator, there was no reason why she would have considered the possibility that the Local 21/81 negotiators in Seattle would agree to contract language removing them from the contract's coverage, and resulting in the elimination of those employees from their respective bargaining units in Union Local 367's

jurisdiction. On the other hand, while Zeiler and Wojciechowski were just as unlikely to have specifically considered the nutrition and playland employees, if they had, from their view of the negotiations, there was no reason why they would not have considered their elimination from the bargaining units in Seattle to be binding on the Union.[13]

Zeiler and Iverson were simply not communicating with each other about the nutrition and playland employees. Further, to the extent that the Me-Too Agreement provided for an exception for a "difference in language" to the complete adoption of the Seattle Settlement by the Union, the two negotiators appeared to be "talking past each other" as their understanding of that reference was totally at variance.

Having concluded that the parties did not have a "meeting of the minds" regarding the Me-Too Agreement, I must still decide where that leaves the parties, and whether the Act has been violated by the Respondents' refusal to apply the terms of the Seattle Contract to the nutrition and playland employees represented by the Union, including payment of the lump sum ratification bonus. To begin with, I am of the view that the Union continues to represent the nutrition and playland employees in their respective Expanded Units.

It is a deeply rooted principle that the Board requires that a waiver of a statutorily protected right must be "clear and unmistakable." *NLRB v. Southern California Edison Co.,* 646 F.2d 1352, 1364 (9th Cir. 1981); *Tocco Division of Park-Ohio Industries,* 257 NLRB 413, 413-14 (1981) (noting that a union may waive a statutory right to bargain, but the Board requires a waiver to be found in "'express contract language or unequivocal extrinsic evidence bearing upon ambiguous contractual language'"); Kansas National Education. Ass'n, 275 NLRB 638, 639 (1985) ("It is well settled that a union has a statutory right to be consulted about a change affecting the terms and conditions of employment. The union may waive this right; such a waiver may not be lightly inferred but must be 'clear and unmistakable.'"). The Board has further established that "once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board. *Wackenhut Corp.,* 345 NLRB 850, 852 (2005). In other words, one cannot divine a "clear and unmistakable waiver," as it either exists or does not exist.

In the matter before me, the record unequivocally indicates that there was no "clear and unmistakable" waiver by the Union as to the bargaining rights of the nutrition and playland employees. In fact, the record establishes quite the opposite. The 2010 Me-Too Agreement facially contains no language regarding the exclusion of either of these groups nor does it mention any type of waiver to unit scope or unit composition, changes that could be bargained as part of the Seattle Agreement. Rather, the face of the 2010 Me-Too Agreement suggests that such changes to the bargaining units' scope and composition were not even contemplated during the 2010 Me-Too Agreement negotiations. This assertion is fortified by the fact that there exists no evidence in the record to suggest that the Union manifested any intent on any level to waive its bargaining rights with respect to the scope and composition of the two bargaining units. Accordingly, the Union not having waived its right to represent the nutrition and playland employees, they continue to remain as part of their respective bargaining units.

[13] The elimination of employees from a bargaining unit, while not a mandatory subject of bargaining, is certainly a permissive subject of bargaining. See *Boise Cascade Corp. v. NLRB,* 860 F.2d 471 (D.C. Cir. 1988); *The Grosvenor Resort,* 336 NLRB 613, 617 (2001).

Having concluded that the Union did not waive its right to continue to represent the nutrition and playland employees in their respective units, I must still decide what happens to the employees represented by the Union in light of my finding that the parties did not have a "meeting of the minds" regarding the 2010 Me-Too Agreement. Preliminarily, the Board decision in *Fred-Mogual Corp.,* 209, NLRB 343, 344 (1974) is very instructive regarding the issue of bargaining where groups of employees have voted to be included in existing units of employees. That is an analogous situation to the one before me.

In *Fred-Mogual,* the employer and the union had an existing contract in effect at the time that a group of employees voted to join the existing unit. The Board held that the employer became obligated to engage in good faith bargaining as to the terms and conditions of employment to be applied to this new addition to the previous unit. Further, the Board held that the employer committed an unfair labor practice when it insisted that the new group of employees simply be covered by the existing agreement. The parties' obligation to bargain existed despite the fact that there was a contract in existence that provided for the terms and conditions of employment for the previous unit. The Board, citing *H.K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970), noted that while it has the power to order parties to negotiate, it does not have the authority to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement. Additionally, the Board held that where the union was opposed to simply covering the new group with the existing contract, the employer must bargain for interim terms and conditions for the new group, and, if agreement is reached, to enter into an interim contract. Then, when the existing contract covering the original employees in the unit expires, the parties are expected to negotiate for one collective-bargaining agreement covering all the employees in the new expanded unit. Thereafter, while a single contract may certainly contain special or separate classifications and conditions for specific groups of employees within the one newly expanded unit, it will do so under the general terms of one contract.

While it is true that the expression "meeting of the minds" does not require that both parties have the identical subjective understanding on the meaning of material terms of agreement, the terms themselves must be unambiguous judged by a reasonable standard. *Diplomat Envelope Corp.,* 263 NLRB 525, 535-36 (1982). However, I believe that in the matter before me, the parties' understanding of what the Me-Too Agreement encompassed was so divergent as to preclude any true "meeting of the minds." Having concluded that the parties did not reach a "meeting of minds" concerning the meaning of the 2010 Me-Too Agreement, I must now address how such a failure affects both the employees in the original Grocery and CCK Units, and how it affects the nutrition and playland employees, now included, respectively, in those Expanded Units.

At first blush, it might appear under general contract principles that without a "meeting of the minds" regarding the Me-Too Agreement that the Union and the Respondents had not entered into a binding 2010 contract. *Sunrise Nursing Home, Inc*., 325 NLRB 380, 389 (1998). However, the Board is not strictly bound by the technical rules of contract law, but rather is free to use the general contract principals that are adapted to the collective bargaining context. *NLRB v. Electra-Food Machinery, Inc.,* 621 F.2d 956, 958 (9th Cir. 1980) (determining whether an oral agreement between the parties had been reached); *Lozano Enter. V. NLRB,* 327 F.2d 814, 818 (9th Cir. 1964) (noting that, while the employer's arguments were sound in contract law—the employer's employee was truly not an agent and could not bind the employer to a contract—technical contract law does not always state good collective bargaining law). In fact, in the context of labor disputes, particularly Section 8(a)(5) violations, the crucial inquiry is whether the two sides have reached an "agreement," even though the "agreement" might fall short of meeting all the technical requirements of an accepted contract. *NLRB v. Donkin's Inn.,*

532 F.2d 138, 141 (9th Cir. 1976), *cert. denied,* 429 U.S. 895 (1976).

Counsel for the Acting General Counsel argues in her brief that a finding that there was no "meeting of the minds" concerning the Me-Too Agreement "would unnecessarily disrupt the labor stability" for thousands of employees in the Union's CCK and Grocery Agreements covered by the Seattle Negotiated Contracts. *Colgate-Palmolive-Peet Co.,* 338 U.S. 355, 362 (1949) (primary objective of Congress in enacting the National Labor Relations Act was achieving stability of labor relations). However, there is no logical reason to disrupt the contractual relationship established by the 2010 Agreement as that contract applies to the original CCK and Grocery Units. There is no dispute that under the Me-Too Agreement the terms and conditions of the Seattle Negotiated contracts apply to all the employees represented by the Union in the respective units, before they were expanded. The only failure to reach a "meeting of the minds" was in regard to the nutrition and playland employees. While strict contract principles would seem to require that without a "meeting of the minds" on the Me-Too Agreement there is no contract covering the employees in the two units, the latitude afforded agreements in the collective bargaining context would mitigate against such a harsh finding.

The need for labor stability and the fact that the parties have been living under the terms of the Seattle Negotiated contracts for more than two years for all unit employees with the exception of nutrition and playland, would well serve to maintain those contracts in effect for all but the two classifications in question. See *DST Insulation, Inc.,* 351 NLRB 19 (2007) (in which the Board held that a binding agreement may be formed even when the parties have not reduced to writing their intent to be bound if the party at issue has engaged in a course of conduct that reflects its intent to follow the terms of the agreement). Therefore, I conclude that the Respondents and the Union did reach agreement on the terms of contracts covering the CCK and Grocery Units represented by the Union for a term of three years (Jt. Ex. 14 and 15.)[14], with the exception of the nutrition and playland employees. Accordingly, those contracts remain in full force and effect as they relate to the employees in the CCK and Grocery Units represented by the Union, with the exception of the nutrition and playland employees.

As to the nutrition and playland employees, while I conclude that they remain part of their respective Expanded Units, because the parties failed to reach a "meeting of the minds" regarding the Me-Too Agreement and its application of the Seattle Negotiated Settlement to these two classifications, I conclude that they are not covered by the contracts in effect for the other members of their respective units. Of course, the further question which remains is what then happens to the nutrition and playland employees. I am of belief that the answer to that question is found in the case of *Federal-Mogual Corp., supra.*

For the reasons expressed above, the nutrition and playland employees remain part of their respective Expanded Units. The Board and the Court of Appeals have already settled the appropriateness of those units. Under *Federal-Mogual,* the Respondent Fred Meyer is obligated to bargain with the Union over the terms and conditions of employment of the nutrition and playland employees, assuming the Union makes such a request, and, if agreement is reached, to execute a collective bargaining agreement covering those employees. This "interim" agreement covering the nutrition and playland employees would remain in effect until the expiration of the current CCK and Grocery Agreements between Fred Meyer and the Union

[14] The contract in effect between the Union and Fred Meyer for the Grocery Unit is by its terms effective from October 3, 2010, through October 5, 2013. (Jt. Ex. 14.) The contract in effect between the Union and Fred Meyer for the CCK Unit is by its terms effective from May 2, 2010 through May 4, 2013. (Jt. Ex. 15.)

covering the other employees in the respective Expanded Units.

Regarding the expiration of the current CCK and Grocery Agreements, the Respondent Fred Meyer is obligated to bargain with the Union over successor agreements that would cover all the employees in the respective Expanded Units, including the nutrition and playland employees. Under *Federal-Mogual,* the parties are obligated to negotiate single individual contracts that will provide for the terms and conditions of employment of all the employees in each of the respective Expanded Units, unless the Union clearly and unambiguously waives its right to continue to represent the nutrition and playland employees in their respective Expanded Units.[15] As I have already concluded, to date such a waiver by the Union has not occurred.

Further, until such time as the parties have had an opportunity to bargain over the terms and conditions of interim contracts for the nutrition and playland employees, Board precedent requires that no unilateral changes be made in the wages and benefits of the nutrition and playland employees. As it is a permissive, rather than a mandatory subject of bargaining, the Respondent Fred Meyer may not adamantly insist to impasse upon totally separate agreements for the nutrition and playland employees, "so designed as to effectively destroy the basic oneness of the unit[s]," which the Board has already found appropriate. *Fred-Mogual, supra.*

D. Findings Regarding the Complaint Allegations

1. The Failure to Pay the Lump Sum Bonus and to Bargain

It is alleged in complaint paragraphs 9(e), (f), and (g) that the Respondents have failed to distribute to the nutrition and playland employees the lump sum ratification bonus and apply the general terms of the 2010 Contracts negotiated by means of the Me-Too Agreement and have refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. However, as I have concluded that the parties did not have a "meeting of the minds" regarding the Me-Too Agreement and its affect on the nutrition and playland employees and, concomitantly, no valid contracts exist between Fred Meyer and the Union regarding the nutrition and playland employees, I must further conclude that the Respondents have not violated the Act in refusing to apply the terms of those contracts and pay the lump sum bonus to the nutrition and playland employees and have not refused to bargain in good faith. Therefore, I recommend to the Board that these complaint allegations be dismissed.

Similarly, as the parties were in fundamental disagreement over the meaning of the Me-Too Agreement and whether by its terms the nutrition and playland employees were covered by the 2010 Contracts, and, concomitantly, whether any further negotiations were required for the nutrition and playland employees, I conclude that the Respondents did not violate Section 8(a)(5) and (1) of the Act in failing to engage in further negotiations, including over "unique" terms and conditions of employment, as alleged in complaint paragraphs 10 and 11. Therefore, I recommend to the Board that these complaint allegations be dismissed.

2. The Posting of the Notice Regarding the Bonus

Complaint paragraph 8 alleges that on January 5, 2011, the Respondent Fred Meyer

[15] "Single contracts often have separate or special provisions for separate classifications, departments, or shifts, depending upon the extent to which the bargaining has developed agreement upon whether all-inclusive provisions are adequate or inadequate to deal with the problems of each such group." *Federal-Mogual, supra.*

posted a notice to employees at all its stores represented by the Union, blaming the Union for the lack of ratification bonuses and for the delay in reaching a collective bargaining agreement, which action is subsequently alleged as a violation of Section 8(a)(1) of the Act.

As noted earlier in this decision, on January 5, 2011, a notice to associates, bearing the name of Carl Wojciechowski, Vice President of Human Resources, was posted at the Respondent Fred Meyer's stores. It set forth the Respondents' position that the Union had "refused to accept" the contracts negotiated with Locals 21 and 81 under the terms of the Me-Too Agreement that the Union and the Respondents had signed. Further, the notice continued, "As a result, we cannot pay you a ratification bonus or move forward on any of the other contract provisions until this matter is resolved." The notice concluded with the hope that the matter could be resolved quickly and have the ratification bonus paid, but with the caution that if the parties needed to go to arbitration to resolve their dispute, it might take some period of time to conclude. The posting of this notice is admitted by the Respondent Fred Meyer.

In her post-hearing brief, counsel for the Acting General Counsel argues that this notice blaming the Union for the delay in distributing the lump sum ratification bonus was inaccurate, misled the employees to believe that "the delay was caused by Union obduracy," and tended to undermine employee support for the Union. However, I find that this mischaracterizes the notice. The notice plainly stated that the Union had refused to accept "it," meaning the Seattle Negotiated Contracts, as they applied to the nutrition and playland employees. That was accurate. As I have discussed at length, the parties failed to reach a "meeting of the minds" regarding the meaning of the Me-Too Agreement and to what extent it bound the Union to the Seattle Negotiated Contracts. Because of that disagreement, the Respondent Fred Meyer was refusing to pay the lump sum bonus to the Union represented employees until the matter could be resolved through arbitration, which might take some time. Again, I see nothing misleading about these statements.

In any event, even if a reading of the notice would tend to lead the reader to feel that the Union was somehow at fault, I fail to see how that bit of propaganda rises to the level of an unfair labor practice. Such a communication is completely permissible under Section 8(c) of the Act, as it constitutes an expression of "views, argument, or opinion," which "contains no threat of reprisal, or force, or promise of benefit." The Respondent's employees are adults and should be treated as such. Certainly they should be capable of hearing the arguments of the parties and deciding for themselves whether the failure to agree as to the meaning of the Me-Too Agreement was the fault of the Union or the Respondents. Of course, the Union was free to issue its own explanation to its members as to why the Respondent Fred Meyer was failing to pay the lump sum ratification bonus, and, if it chose, to place the onus on the Respondents. Presumably it did so.[16] But, in any event, the Respondent's employees should not be considered as children unable to decide such matters for themselves.

The case law is well settled that an employer has the right to give his or her opinion and communicate his or her views about the union to the employees under Section 8(c) of the Act and the First Amendment to the United States Constitution. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969). *See also Sears, Roebuck & Co.,* 305 NLRB 193, 193 (1991) ("Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of

[16] As early as December 27, 2010, a week before the Employer posted the notice in question, the Union was placing its own "spin" on the Respondents' refusal to pay the lump sum bonus. Iverson authored a letter of that date to the union members placing the blame on the Respondents for delaying the payment of the bonus. (Res. Ex. 5.)

Section 8(a)(1)."); *Children Center for Behavioral Development,* 347 NLRB 35 (2006) ("[A]n employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees.").

In *Optical Lee Borinquen, Inc.,* 307 NLRB 705, 708-709 (1992), the Board affirmed the administrative law judge who said, regarding an anti-union letter sent to employees during an organizing campaign, that "Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness." Further, while the judge found the letter to be "an attempt to draw upon emotionalism and overstatement," he concluded that it "merely produced an overall message easily recognizable as self serving hyperbole. Argument of this type is left routinely to the good sense of employees." (*Id.)* The Board found the letter not to constitute a violation of the Act. By comparison to the harsh and disparaging comments employers have made against unions in the above cited cases, the notice from the Respondent Fred Meyer seems rather innocuous.

Accordingly, I find that there was nothing inappropriate about the notice dated January 5, 2011, and certainly nothing unlawful. The Respondent Fred Meyer was expressing its opinion about the reason the lump sum bonus payments were delayed, as it had the right to do under Section 8(c) of the Act. Of course, the notice favored the Respondent Fred Meyer's version of events. Certainly employees would be exposed to the Union's version of events, and they would have the opportunity to reach their own conclusions. Therefore, I find that the posting of the notice in question did not violate Section 8(a)(1) of the Act, and I recommend to the Board that complaint paragraph 8 be dismissed.

Conclusions of Law

1. The Respondent, Fred Meyer Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, Allied Employers, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union, United Food and Commercial Workers Local 367, Affiliated with United Food and Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the Respondent Fred Meyer in the Expanded Grocery Unit constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees employed in Fred Meyer's present and future grocery stores in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the Nutrition Department of the Fred Meyer's Lacey and Tumwater, Washington, retail stores; excluding Nutrition Department Managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Act.

5. At all material times, since August 26, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Expanded Grocery Unit.

6. The following employees of the Respondent Fred Meyer in the Expanded CCK Unit

constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees employed in Respondent Fred Meyer's Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County…and all regular full-time and part-time employees working in the Playland Department of the Respondent Fred Meyer's University Place retail store, located in Tacoma, Washington; excluding guards, the Department Manager, two Assistant Department Managers, and supervisors as defined in the Act.

7. The Respondent Fred Meyer and the Respondent Allied Employers did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D.C. November 14, 2012

Gregory Z. Meyerson
Administrative Law Judge

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.